STATE OF MICHIGAN

COURT OF APPEALS

YOGESCHANDRA B. PATEL, M.D., Plaintiff-Appellee/Cross-Appellant, v WYANDOTTE HOSPITAL AND MEDICAL CENTER, INC., d/b/a HENRY FORD WYANDOTTE HOSPITAL and DR. ANDREW R. BARNOSKY, Defendants-Appellants/Cross-Appellees.	UNPUBLISHED April 29, 2003 No. 230189 Wayne Circuit Court LC No. 98-815347-CK

Before: O'Connell, P.J., and Fitzgerald and Murray, JJ.

PER CURIAM.

Defendant appeals as of right, and plaintiff cross-appeals, a directed verdict in favor of plaintiff on a claim of breach of contract and a jury verdict in favor of plaintiff on claims of employment discrimination. We affirm in part, reverse in part, and remand for a new trial.

I. Basic Facts and Procedural History

Plaintiff, an emergency room physician at defendant Henry Ford Wyandotte Hospital, was terminated from his employment following an internal investigation initiated by the hospital after it received a patient complaint on April 20, 1996, alleging that plaintiff had conducted an inappropriate examination of the patient's breasts and abdominal area when she came to the emergency room. Following the termination, plaintiff filed suit against the hospital and its then Director of Emergency Services, defendant Dr. Andrew R. Barnosky. In his complaint, plaintiff alleged that he entered into an employment contract with the hospital on June 15, 1989, and that the hospital wrongfully terminated the contract. Count I of the complaint alleged that the termination of plaintiff's employment constituted a breach of contract, and counts II and III alleged national origin and religious discrimination in violation of the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq.* Count IV complained of alleged misrepresentations during the investigatory period, and Count V alleged that defendant Barnosky tortiously interfered with plaintiff's contractual relationship with the hospital when he wrongfully terminated the employment contract.

Defendants moved for partial summary disposition, asserting that they were entitled to a dismissal of the claims of national origin and religious discrimination because plaintiff could not establish a prima facie case of discrimination and that, even if he could, there was a legitimate nondiscriminatory basis for the termination. The motion also sought dismissal of the claims of misrepresentation and tortious interference with contractual relations. In response, plaintiff maintained that he relied on "direct evidence" of national origin/religious discrimination and that he was able to prove a prima facie case of intentional discrimination. He also claimed that there was a genuine issue of material fact regarding alleged misrepresentation. Plaintiff did not address the claim of tortious interference.

At a hearing on the motion on August 13, 1999, plaintiff agreed to dismiss the claim of tortious interference. On November 16, 1999, the trial court issued an opinion granting summary disposition on the claims of misrepresentation and tortious interference but denying summary disposition on the discrimination claims. With regard to the plaintiff's "direct evidence" claims, the court held that the evidence was not overwhelming, but was sufficient to create a question of fact.

On April 14, 2000, plaintiff filed a motion seeking to exclude from evidence a report prepared by Joan Valentine, the hospital's risk manager, following her review of plaintiff's "trend file"[1] as well as several hundred patient charts. Plaintiff argued that the report should be excluded because it was compiled as a result of a review of patient records and therefore violated the physician-patient privilege. A hearing was held on the motion on April 21, 2000, and the court declined to rule on the motion at that time.

On May 4, 2000, a pretrial hearing was held on several motions in limine, including defendants' motion to limit plaintiff's contract damages to a period not exceeding 180 days. The court indicated its inclination to limit the contract damages, but took the motion under advisement. At this hearing the parties also discussed the deposition testimony of Dr. Cathy Frank, the psychiatrist to whom plaintiff was referred following the April 20, 1996, complaint. Plaintiff's counsel indicated that he had some objections regarding the testimony elicited during the deposition that would have to be discussed before the deposition was played to the jury. Additional argument regarding plaintiff's motion to exclude the Valentine report from evidence was also presented. The court indicated that some portions of the report would be admitted, and that it would supply additional clarification before commencement of trial.

Trial commenced on May 8, 2000. Before jury selection, the trial court made rulings on the motions that it had taken under advisement. With regard to the motion to limit contract damages, the court indicated that it would consider the issue and make a ruling the following day. On May 9, the court granted summary disposition limiting the contract damages. In light of this ruling, defense counsel indicated that the hospital was prepared to pay for the alleged breach of contract and that no evidence concerning the contract breach should be admitted into evidence. However, plaintiff's counsel objected to the timing of the removal of the contract

[1] Valentine explained that each physician has a "trend file" that is "kept for credentialing and reappointment" and that patient complaints end up in this file.

claim and indicated his intent to also seek recovery of consequential damages premised on the breach of contract. Thus, the trial court allowed the contract claim to proceed to trial.

With regard to plaintiff's motion to exclude the Valentine report, the court ruled that some of the report would be admitted, but that some portions were to be redacted. The issue continued to be discussed throughout the trial.

The facts concerning plaintiff's period of employment at the hospital and his termination were introduced through the testimony of several witnesses. Barnosky hired plaintiff in June 1985. As department supervisor, Barnosky was apprised of complaints concerning the physicians in the emergency room. On prior occasions, patients had complained that plaintiff had performed an improper act during the course of a pelvic examination. Barnosky spoke to plaintiff about the complaints and discussed with plaintiff the hospital policy concerning the examination of females. He explained to plaintiff that it was hospital policy to have another person present during a pelvic examination, preferably a registered nurse, who should be in a position to view the procedure. Although there was no policy regarding a chaperone at that time for breast examinations, Barnosky advised plaintiff that he should have a chaperone present when performing a breast exam. The complaints were memorialized in memos placed in plaintiff's trend file.

On the morning of Saturday, April 20, 1996, Barnosky received a telephone call at home from Valentine regarding a verbal complaint of sexual impropriety made against the plaintiff the night before by a patient. Barnosky met with Valentine at the hospital and they contacted the patient by telephone to discuss the incident. The patient repeated the allegations as they appeared in the written complaint. Barnosky believed that the patient sounded logical and decided that her complaint needed to be investigated.

Barnosky and Valentine met with plaintiff when he arrived for work that morning. During that meeting plaintiff was advised of the patient complaint. Plaintiff denied any impropriety, but admitted that there was no female chaperone present when he examined the patient. At the conclusion of the meeting, plaintiff was placed on administrative leave with pay pending an investigation. Barnosky told plaintiff that there would be an investigation and that he was hopeful that plaintiff would be able to return to work the following Tuesday. Plaintiff was told that he needed to see a psychiatrist for a "fitness to work" evaluation because of the seriousness of the allegations.

After plaintiff left the meeting, Barnosky and Valentine discussed the previous complaints that Barnosky had received. Barnosky, Valentine, Robert Riney (the hospital's vice-president of human resources), and Dr. Schultz (the chief and vice-president of medical affairs) agreed that Valentine should look at plaintiff's trend file and conduct a review of patient charts to gather data necessary for the investigation into plaintiff's practices to see if there was a pattern of conduct.

Valentine conducted a data review of plaintiff's trend file and a review of the emergency room records of various doctors. Her redacted May 6, 1996, report was admitted into evidence. Defendant objected to the redaction of the report because the report, without redactions, was what was available to hospital personnel during the decision-making process.

In her report, Valentine set forth the results of her examination of emergency room records in which she compared the treatment given by Dr. Patel to that provided by the other emergency room physicians for similar initial diagnoses. Valentine was concerned with female patients between the ages of eighteen and forty whose discharge summaries indicated diagnoses of abdominal complaints, urinary tract infections (UTI), pelvic inflammatory disease (PID), or any combination of these diagnoses. She randomly selected two months of records for each of the years 1991, 1992, 1994, and 1995. For each record, Valentine reviewed the documentation, including the nurses' notes from triage and in the emergency room, and compared these nursing notes with the history taken by the physician. She also reviewed the treatment given and the laboratory results.

Valentine testified that she also pulled records for Drs. Barnosky, Davis, Gardner, Hartman, and Isaac for review. She reviewed 285 charts and found approximately fifty-five total records of Dr. Patel in which inconsistencies between diagnosis and treatment were identified. She did not notice such inconsistencies in the records of the other physicians. Valentine testified that she noted that plaintiff seemed to perform more pelvic exams than other physicians when presented with similar information, and that his treatment was often inconsistent with the nursing notes and laboratory results. When Valentine asked plaintiff about the inconsistencies, his explanation was that "the nurses were lazy and not taking histories for his patients."

In her report, Valentine expressed concern about the incident and the complaints that had been received about plaintiff's examinations. She also expressed concern about plaintiff's reaction at the meeting with Barnosky, where he did not appear to appreciate the implications of conducting certain examinations without a female chaperone even though this issue had been previously discussed with him.

Psychiatrist Cathy Frank performed the fitness to work evaluation and prepared a written report. Under the first heading, "History of Presenting Illness," plaintiff was identified as "a 54-year old Indian physician who has been employed at Henry Ford Wyandotte Hospital for approximately five years and as an Emergency Room physician for the past fourteen years." Dr. Frank detailed the history given to her by plaintiff concerning his examination of the patient, as well as the prior complaint from a pregnant patient who complained that he had touched her clitoris during an examination.

Under the fourth heading, "Psychosocial History," Dr. Frank's report noted that plaintiff "was born and raised in India." According to the report, plaintiff described his mother as a strict woman and a devout Hindu, and his father as also very religious. He described his marriage as a happy one, and told Dr. Frank that he and his wife had three children. The report also stated "He denies any sexual problems in the marriage. He denies any history of sexual perversion or fetish. He stressed that as he is from a Hindu culture, in which there are prohibitions against touching females and this was something he had to overcome in his training and personal life."

Under the heading "Mental Status Exam," Dr. Frank described plaintiff and his mental status, and concluded:

> I have though three major concerns regarding this physician. The first is the fact that at the very least, he used poor judgment in handling this particular patient. He had been told to have a female attendant with him whenever he

performed breast or pelvic exams. He did not follow this basic rule. And when I confronted him about not following this guideline, he did not grasp its importance, for his protection and for that of the patient. He did not learn from his previous mistakes.

Secondly, although he did not admit to any sexual impropriety, there is evidence to suggest such impropriety. This is supported by the fact that he took this patient into the ENT room, when other exam rooms were available. He examined her without a female attendant, even though he had been reprimanded not to do so. His instructions to patients to "move up and bear down" have no role in a standard pelvic exam. **He allegedly told the 1992 complainant during the pelvic exam that "this is why I could never be an obstetrician/gynecologist, as the line is close between an exam and sexual pleasure."** * * * His restrictive background and religious prohibitions regarding sexual contact are consistent with someone who may have sexual conflicts. (**Redacted text in bold**.)

Lastly, I have concerns regarding his clinical abilities. His medical approach to the April complainant seemed to be scattered and not up to a standard of care. For example, he treated the patient for asthma, even though her lungs were clear and he felt that she had no acute pathology. His diagnosis of cystic mastitis is certainly questionable. Although she allegedly had cystic breasts and a discharge, there was no redness, swelling, leukocytosis, or fever to indicate mastitis. I cannot imagine a clinical situation in which a physician would tell a patient, or suggest a boyfriend, "squeeze the secretions from the breast." And I am concerned that a patient with a complaint of lower right quadrant abdominal pain would be examined sitting upright in a chair.

By Dr. Patel's description, this may have been a seductive patient. Nevertheless, in these instances, physicians should take special precautions to not only deliver good quality care, but also have a female chaperone present.

I have serious concerns that Dr. Patel may put patients at risk, not only medically, but by sexual impropriety, whether this be conscious or unconscious.

In her deposition, Dr. Frank indicated that at the time she conducted an independent medical evaluation of plaintiff in April 1996 she was the director of the psychiatric residency program at Henry Ford Hospital and the medical director of ambulatory psychiatry. She explained that during such an evaluation, information is gathered and a detailed history is taken of various items, including "family history and psychosocial history, which includes things such as family of origin, any religious, ethnic, cultural influences that affected who they are as a person." Dr. Frank explained that she had been asked by Mr. Riney to conduct the evaluation and that she had never spoken to Barnosky.

Dr. Frank explained that the examination lasted approximately seventy-five to ninety minutes, and that she explained the nature of the exam to plaintiff. She informed plaintiff that the exam was not confidential and was not being conducted for the purpose of treatment. She testified that her final report reflected the contemporaneous notes she had taken, where she had

attempted to obtain direct quotations. Dr. Frank explained that her conclusions were based on the information she obtained from plaintiff and from Dr. Riney.

Dr. Gerald Shiener was called by the defense as an expert witness. Shiener opined that it was appropriate for plaintiff to be sent for an independent psychiatric evaluation because such an evaluation, called a "fitness for work" evaluation, was strongly recommended for the protection of the doctor, the hospital, and the hospital's patients. With regard to the report prepared by Dr. Frank, Shiener testified:

> A. The behavior that was described in his document that is Dr. Frank's report of the history that she took from Dr. Patel would be alarming and would be the kind of behavior that would lead a department chairman or a department director to question the doctor's fitness to practice and to cause to be undertaken or to cause to be performed a fitness exam.
>
> Q. Why?
>
> A. Because a doctor who exhibits bad judgment or does not follow directives that have been provided him or approaches medical problems in a unique atypical way can pose a danger to himself, to the institution, and to the patients that the institution serves.

Shiener also testified that an individual's cultural and economic background is relevant in a psychiatric evaluation.

At the conclusion of the investigation a decision was made to terminate plaintiff's employment with the hospital. Riney testified that before making the decision he reviewed Valentine's report and Dr. Frank's report, and that interviews had been conducted of plaintiff, the patient, and other staff members. He testified that there was no discussion of plaintiff's religion or national origin, and that the consensus was that plaintiff's employment contract "could no longer continue and that we would offer him the option to either resign his employment or be terminated."

On May 9, 1996, Barnosky and Riney met with plaintiff and informed him of the results of the hospital's investigation. Barnosky testified that plaintiff's employment was terminated as a result of the investigation of the patient's complaint. Plaintiff was advised that he could resign or be terminated. Plaintiff declined to resign. On June 7, 1996, Riney mailed a letter by ordinary mail to plaintiff notifying him that his employment contract was terminated effective July 8, 1996.

Plaintiff testified that he was born in India and that he came to the United States in 1978. He was licensed to practice medicine in Michigan in 1982, and became board-certified in emergency medicine in 1990. He responded to an advertisement for an emergency room physician and was told by Barnosky to come in for an interview the following day. Barnosky offered the job to plaintiff "on-the-spot."

Plaintiff indicated that as the patient load in the emergency room increased over the years, he talked to Barnosky about the quality of the nurses. He complained that the nurses

provided "slow care" to his patients and that they did not "chart immediately." Barnosky informed plaintiff that he would "see to that." When plaintiff again complained in 1994, Barnosky told him to talk to the clinical nurse manager. Afterward, the situation with the nurses "got worse" and the nurses began "internal bashing" with comments such as "we don't like Indian doctors." Plaintiff testified that a nurse said that "Indian doctors are lazy" and that they "like white girls." Plaintiff also testified that on one occasion in 1994 he heard Barnosky say that he "didn't like lazy Indian doctors, but that plaintiff was an exception." Plaintiff related the nurse's behavior to Barnosky.

Plaintiff testified that he always had a female chaperone present during a pelvic examination, but that sometimes the chaperone was an emergency department assistant who did not have the ability to "chart." He agreed that the chaperone should be a registered nurse.

With regard to the incident at issue, plaintiff testified that he saw the patient in the emergency room at approximately 9:45 p.m. on April 19, 1996. The patient complained of chest pains and shortness of breath and indicated that she had received no relief from breathing treatments at home. Plaintiff noticed that the patient had decreased breath sounds with minimal wheezing. Plaintiff ordered a complete blood count, electrolytes, blood sugar, a chest x-ray, cardiogram, pulmonary function test, and breathing treatment.

Plaintiff left the patient and attended to other patients for approximately 2-1/2 to 3 hours. After receiving the patient's test results and determining that all of the results were normal, plaintiff located the patient in the "urgent care chair area." Plaintiff talked to the patient in the hall and told her that he was ready to send her home and that she should follow-up with her doctor. The patient indicated that her breathing was worse and that she had chest pain and palpitation. In light of the complaint, plaintiff listened to the patient's back and front through a gown. He noted that her lungs were clear and that she had minimal wheezing. Plaintiff told the patient that "things sounded good" and told her to go home and make an appointment with her doctor. The patient then pulled her gown down and "did something with her breast." She asked, "What is this white stuff" discharging from her breast. Plaintiff put a glove on and looked at the discharge to see if there was any blood or puss. Plaintiff told the patient that the discharge looked like breast milk. The patient then grabbed plaintiff's hand and put it on her breast and said, "feel this, this is where I hurt." Plaintiff indicated that he did briefly feel a lump as his hand passed over her breast.

Plaintiff then took a history from the patient regarding her breast problems. Plaintiff was aware that lumps could be caused by pregnancy or cystic mastitis, so he referred the patient to her doctor. The patient then showed plaintiff her other breast, massaged it, and said that it had discharge and was painful. Plaintiff told the patient to use warm compresses before "squeezing" out the discharge and to take Tylenol. The patient indicated that she wanted a doctor to squeeze out the discharge. Plaintiff refused, and told the patient that she could squeeze it out herself or have a friend do it. The patient continued to be persistent, so plaintiff tried to change the subject by asking her if she had a boyfriend.

Plaintiff turned away to take off his gloves, and the patient removed her gown and said, "I'm hurting here" while pointing to her abdomen. Plaintiff made a quick jabbing movement to plaintiff's abdomen, and she did not indicate any pain. The patient then put plaintiff's hand on her abdomen one inch below her belly button. Plaintiff noticed an "ugly scar" at this site that the

patient said was from a "tummy tuck." Plaintiff told the patient that her pain was likely caused by scar tissue and told her to see her OB/GYN.

Plaintiff testified that the following day Barnosky and Valentine showed him a chart with the name removed and asked him if he remembered the patient. Plaintiff told Barnosky what happened with the patient and noted that there was nothing "unusual." Barnosky did not show plaintiff any documents, but told plaintiff to go home. Barnosky advised plaintiff to see a psychiatrist because he was "under stress."

Later, Riney phoned plaintiff and gave him the name of psychiatrist Cathy Frank. Plaintiff signed a release to allow Dr. Frank to send a report to the hospital. However, plaintiff did not know that he was seeing Dr. Frank as part of the investigation. Plaintiff testified that he met with Dr. Frank for approximately forty-five minutes, during which she asked him questions about his background and he told her that he was from India and that his parents were Hindu. Plaintiff denied telling Dr. Frank many of the items contained in her report. He denied that he told her that his mother was a devout Hindu, or that his parents were strict Hindu. He testified that there are different sects of Hindu religious, although there is not much difference between the sects. According to plaintiff, his sect does not prohibit the touching of females and he testified that he did not tell Dr. Frank otherwise. Plaintiff testified that he did not tell Dr. Frank that he had been raised restrictively or that he was sexually repressed. He indicated that at a meeting with Barnosky and Riney on May 9 he was told that the hospital "has to let you go because you are sexually suppressed and Indian with Hindu restricted background and a danger to the patients."

Following plaintiff's proofs, plaintiff moved for a directed verdict on the breach of contract claim. Defendants objected, arguing that, in light of plaintiff's presentation of proofs on the contract claim, it was up to the jury to decide whether plaintiff was entitled to wages for thirty days or 180 days following the effective date of the termination. The trial court directed a verdict on the contract claim, awarding plaintiff a total of $262,500 for the period of time he was on administrative leave, plus 180 days following the termination. At the close of proofs, the court denied defendants' motion for directed verdict on the discrimination claims.

The jury returned a verdict on the discrimination claim in the amount of $250,000 for past wage loss and $750,000 for past emotional distress. The trial court denied defendants' motion for judgment notwithstanding the verdict, new trial, or remittitur. The trial court also denied plaintiff's motion for a new trial or additur.

I

Defendants first argue that the evidence was insufficient to support the jury's verdict and that the trial court therefore erred by denying their request for judgment notwithstanding the verdict. In the alternative, defendants argue that the verdict was against the great weight of the evidence and that they are entitled to a new trial.

A trial court's decision on a motion for JNOV is reviewed de novo. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000); see also *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). In reviewing the decision, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the

nonmoving party. *Forge, supra*. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Only if the evidence failed to establish a claim as a matter of law is JNOV appropriate. *Forge, supra*; *Chiles, supra*.

This Court reviews the trial court's grant or denial of the motion for new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998); *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). This Court gives deference to the trial court's opportunity to hear the witnesses and its consequent unique qualification to assess credibility. *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988); *Kochoian v Allstate Insurance Co*, 168 Mich App 1, 11; 423 NW2d 913 (1988). The trial court's determination that a verdict is not against the great weight of the evidence is given substantial deference. This Court must analyze the record on appeal in detail. *Morinelli*, *supra*; *Arrington v Detroit Osteopathic Hospital (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *Daoust, supra*.

The Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, prohibits employment discrimination on the basis of religion or national origin. MCL 37.2202(1)(a). To prove religious or ethnic discrimination, a plaintiff must establish that religious or ethnic discrimination was a determining factor in the alleged adverse employment action. *Alspaugh v Comm on Law Enforcement Standards*, 246 Mich App 547, 563; 634 NW2d 161 (2001).

A claim of intentional religious or ethnic discrimination may be premised on either direct or circumstantial evidence. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001). Here, plaintiff's claim was based on direct evidence. Direct evidence has been defined as evidence that, if believed, "requires the conclusion that unlawful discrimination was at least a motivating factor." *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997). Where direct evidence of discrimination is offered, a plaintiff is not required to establish a prima facie case of discrimination within the framework of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).[2] Rather, where a plaintiff presents direct evidence of discrimination, the case proceeds as an ordinary civil case, i.e., the plaintiff must prove unlawful discrimination as the plaintiff would prove any other civil case. *Hazel v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001).

Here, plaintiff presented direct evidence of religious and ethnic discrimination. Plaintiff testified that he was told that his employment was being terminated because "you are sexually suppressed and you are Indian with Hindu restricted background." Taken in a light most favorable to plaintiff, this statement is direct evidence of religious and ethnic animus, evidence that, if believed, requires a conclusion that unlawful discrimination was at least a motivating

[2] The *McDonnell Douglas* standard for establishing a prima facie case of discrimination in a case involving circumstantial evidence requires a plaintiff to establish that that (1) plaintiff belongs to a protected class, (2) plaintiff suffered an adverse employment action, (3) plaintiff was qualified for the position, and (4) the circumstances of the adverse action give rise to an inference of unlawful discrimination.

factor in the adverse employment action. *DeBrow*, *supra* at 538-540. Thus, the trial court properly denied the motion for JNOV.

Defendant argues in the alternative that the trial court should have granted a new trial because the jury's verdict was against the great weight of the evidence. Specifically, defendant claims that although plaintiff may have presented the minimum quantum of evidence necessary to get the issue of whether defendants discriminated against plaintiff to the jury, the overwhelming weight of the credible evidence favored defendant's position.

A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e), *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). However, the jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the fact finder." *Ewing v Detroit*, 252 Mich App 149, 169-170; 651 NW2d 780 (2002); *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The trial court's determination that a verdict is not against the great weight of the evidence is given substantial deference. *Morinelli*, *supra*. If conflicting evidence is presented, the question of credibility ordinarily should be left for the fact finder. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998); *Ewing*, *supra* at 170.

Because of plaintiff's direct evidence of discrimination, this case presents a question of mixed motives, one in which defendants' decision to fire plaintiff could have been based on several factors, legitimate ones as well as legally impermissible ones. Thus, once plaintiff presented direct evidence of discrimination, defendant had the burden of establishing by a preponderance of the evidence that it would have reached the same decision without consideration of plaintiff's protected status. In other words, if the employer can show that the same decision would have been reached even in the absence of discrimination, no liability arises. *Harrison*, *supra* at 613. See also *Wilcoxin v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360-361; 597 NW2d 250 (1999).

In this case, the direct evidence of intentional discrimination centered on Dr. Frank's report. That report identified plaintiff as an Indian Hindu and set forth a history that detailed a strict upbringing with religious restrictions on the touching of women. One conclusion reached in the report was that plaintiff's "restrictive background and religious prohibitions regarding sexual contact are consistent with someone who may have sexual conflicts." Plaintiff alleged that Barnosky told him that the decision to terminate his employment was made "on the basis of Dr. Cathy Frank's report that you are sexually suppressed and you are Indian with Hindu background." Plaintiff also relied on direct evidence to demonstrate that Barnosky, who both hired and had a role in the decision to fire plaintiff, had a predisposition to discriminate against him. Plaintiff referred to a remark allegedly made by Barnosky in 1994 about lazy Indian doctors. Plaintiff also testified that he talked to Barnosky in 1994 about racial comments made by members of the nursing staff and that Barnosky took no discernable action.

Given this evidence, and keeping in mind the stringent standard that is applied when considering a motion for new trial that is based on the great weight of the evidence, we conclude that the trial court did not abuse its discretion by denying defendants' motion for new trial. Although conflicting evidence was presented, plaintiff presented sufficient evidence of discrimination that, if believed by the jury, was sufficient to support the verdict.

II

Defendants argue that the trial court erred when it held that certain information obtained from patient records was protected by the physician-patient privilege and was therefore inadmissible. They maintain that this holding failed to effect a proper balance between the competing interests of patient confidentiality and patient protection and served to deprive defendant of a fair opportunity to defend themselves against allegations that their employment decision was premised on improper considerations.

A preliminary issue of law regarding admissibility of evidence based upon construction of a statute is subject to de novo review. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). The decision whether to admit the evidence is reviewed for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998).

The physician-patient privilege in MCL 600.2157 provides in pertinent part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.

In a series of rulings, the trial court held that certain evidence contained in the investigative reports that had been gleaned from patient records could not be presented to the jury because admission of such evidence violated the physician-patient privilege. Thus, Valentine's report, Dr. Frank's report, and the testimony of Valentine and Dr. Frank were either redacted or limited. In so ruling, the trial court relied on *Baker v Oakwood Hospital Corp*, 239 Mich App 461; 608 NW2d 823 (2000). In *Baker*, the issue presented was whether the physician-patient privilege applied to defeat the plaintiff's request for the release of non-party patient records she deemed necessary to prosecute a wrongful discharge claim against the defendant hospital and doctor. The plaintiff, a registered nurse, alleged that the defendant doctor had required her to practice medicine without a license in her interaction with patients, and that her complaints about this requirement were causally related to the termination of her employment. This Court concluded that the physician-patient privilege operated as an absolute bar to the unauthorized disclosure of patient medical records, recognizing no exception for records from which patient names had been redacted.

Baker, however, is distinguishable in that it considered release of the medical records themselves. The present case does not involve the release of medical records but, rather, reports that contained information gleaned from a permissible review of patient records. Neither *Baker* nor any of the cases on which *Baker* relied considered the admissibility of evidence that did not reveal the patient's identity or any information from which that identity could be discovered. For example, in *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26; 594 NW2d 455 (1999), the plaintiff sought discovery of the name of the non-party patient who shared her room and who may have observed the alleged medical malpractice of the defendant. The Court concluded that the release of such information would be directly contrary to the statutory privilege and its purpose of promoting confidential communication between patient and physician. See also *Dierickx v Cottage Hosp Corp*, 152 Mich App 162; 393 NW2d 564 (1986) and *Schechet v*

Kesten, 372 Mich 346; 126 NW2d 718 (1964) (cases in which the plaintiff sought release of medical records).

The present case is also distinguishable from *Baker* in that the information in the present case is of a different character than that sought in *Baker*. This case does not involve the release of medical records themselves or the release of identifying information about the patient. Rather, this case involves a summarization of information gathered from medical records with regard to plaintiff's own actions and comments in treating patients. Thus, the information that was redacted, all of which was considered by defendants and relevant to their employment decision, was not "necessary to enable the person to prescribe for the patient as a physician." For example, information contained in the Valentine report that pelvic exams were done on two minors without any evidence of parental consent was stricken, as was plaintiff's notation that one of these minors was "too tight" to allow for a complete exam. Two other redacted notations in the report indicated that there was no documentation in either chart that any staff member had been present during the pelvic examinations. There was also a redaction in Dr. Frank's evaluation in which she reported that there had been a complaint against plaintiff because he stated, during the course of a pelvic examination, that he could never have been an obstetrician or gynecologist because "the line is close between an exam and sexual pleasure."

Other information redacted from the Valentine report focused on plaintiff's practice of performing pelvic examinations that were not indicated by the patients' complaints. The report compared patients' presenting complaints with the ultimate diagnosis and treatment that was rendered. Again, the report did not include any identifying information regarding the patients and did not include any patient's medical records.

Under these circumstances, we conclude that the present case is distinguishable from *Baker*. Here, the hospital sought to use the information obtained from a permissible review of the medical records of plaintiff's patients in defense of a discrimination claim to explain the reasons for plaintiff's termination and did not seek to admit the medical records themselves.[3] The evidence sought to be admitted did not contain any identifying patient information. In addition, the majority of the information redacted was not information necessary to enable plaintiff to prescribe for the patient as a physician but, rather, was either about what was not in the charts or statements of plaintiff reported by the patient. Under these circumstances, we conclude that admission of the evidence was not precluded by the physician-patient privilege. Because defendants could not be held liable for an erroneous decision, but rather only for a discriminatory one, the jury needed the redacted information to properly consider whether, based on the information available to defendants, plaintiff's national origin and religion was a substantial factor in his termination. Without knowledge of the information presented to defendants, the jury could not fairly and properly make this determination and, therefore,

[3] In *Stachowiak v Subczynski*, 411 Mich 459, 464-465; 307 NW2d 677 (1981), the Court held that the prohibition against the use of hearsay did not preclude introduction of evidence that was admitted to explain why certain action had been taken by the defendant, further finding that that there had been no abuse of discretion in admitting the evidence because it was "central to the defense that Dr. Subczynski based his judgment as to how to proceed with the treatment on his understanding of the consequences of various treatments." Similarly, in the present case the redacted evidence was central to defendants' defense.

defendants were denied a fair trial by the trial court's erroneous decision to redact the evidence. Accordingly, we reverse the jury's verdict on the claim of employment discrimination and remand for a new trial on this claim.

III

There is no dispute that plaintiff was entitled to contract damages for the period of April 20, 1996, through June 7, 1996, while he was on administrative leave. Defendants argue on appeal that additional damages were limited under the contract to the thirty-day period following June 7, 1996,[4] and, therefore, the trial court erred when it directed a verdict awarding damages for a period of 180 days after the July 8, 1996, effective date of the termination. The construction and interpretation of a contract is a question of law for a trial court that this Court reviews de novo. *Henderson v State Farm Fire and Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

In construing contractual language, a court should strive to effectuate the intent of the parties. Contract language is construed according to its ordinary and plain meaning; technical and strained constructions are to be avoided. *SSC Associates Limited Partnership v General Retirement System of the City of Detroit*, 210 Mich App 449, 452; 534 NW2d 160 (1995). A trial court may direct a verdict on a breach of contract claim as a matter of law where the terms of the contract are plain and unambiguous, and subject to only one reasonable interpretation. *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999); *BPS Clinical Laboratories v Blue Cross and Blue Shield of Mich (On Remand)*, 217 Mich App 687, 700; 552 NW2d 919 (1997).

The employment agreement contained four methods for termination that were set forth in Article III, paragraph 4. Defendants relied upon two of these four methods at trial. Article III, paragraph 4(A) provided:

> (A) If either of the parties hereto commits a material breach of any of the terms or conditions of this Agreement and the breaching party fails to correct such breach within thirty (30) days after written notice thereof from the other party, such other party, at its option, may terminate this Agreement immediately or at any designated future time, provided the breach still exists, by delivering to the breaching party a written notice of termination and the effective date thereof.

Article III, paragraph 4(D) provided that the agreement "may be terminated by either party at any time during its term, without a showing of cause and without liability to the other (except to perform all obligations hereunder up to the effective date of the termination) upon not less than one hundred eighty (180) days written notice to the other."

Plaintiff was advised of the termination of his employment by correspondence dated June 7, 1996:

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[4] By correspondence dated June 7, 1996, defendants advised plaintiff of the termination of his employment.

> This letter is a follow-up to your conversation with myself and Dr. Andrew Barnosky on May 9, 1996. As you are aware, based on an investigation involving patient complaints and pursuant to Article III General Provisions of your employment contract with Henry Ford Wyandotte Hospital, you were provided with the option of resignation of your employment or termination of the contract. We have not heard from you either verbally or in writing regarding any interest in resignation which at this point leaves us no alternative but to terminate your employment contract effective July 8, 1996 pursuant to employment agreement. Your compensation at your current rate of pay will continue through July 8, 1996.

Barnosky conceded at trial that the notice of termination did not satisfy the requirements of paragraph 4(A) because the notice did not give plaintiff the opportunity to cure. In addition, there is no dispute that the termination notice was not provided to plaintiff by either personal delivery or by certified or registered mail pursuant to Article III, paragraph 8 of the employment agreement. However, there is also no dispute that plaintiff did in fact receive the notice of termination. The trial court held that the notice was sufficient to terminate the contract under § 4(D), but was not sufficient to terminate the contract under § 4(A) because plaintiff had not been provided an opportunity to cure the material breach of the contract within the thirty-day period.

Defendants now argue that plaintiff's damages should have been limited to thirty days because no opportunity to cure needed to be given because of the nature of the breach involved. The plain language of paragraph 4(A) makes no exception for breaches that cannot be cured and, therefore, it was reasonable for the trial court to conclude that paragraph 4(A) required that plaintiff be given thirty days to cure the breach. However, it appears that paragraph 4(A) is not applicable in the present case. Paragraph 4(A) applies to a situation where a party "commits a material breach of any of the terms or conditions of this Agreement and the breaching party fails to correct such breach within thirty (30) days after written notice thereof . . ." This case does not involve a breach of the terms or conditions of the agreement (such as failure to work the required number of hours, etc.), but, rather, plaintiff's alleged improper conduct with a patient. Clearly, improper conduct toward a particular patient cannot be "cured." It does not appear that paragraph 4(A) is applicable in this case and, therefore, termination pursuant to paragraph 4(A) would not be appropriate. Thus, the trial court properly rejected defendant's claim to limit plaintiff's contract damages to thirty days under paragraph 4(A) as a matter of law.

Given the nature of the allegations, defendants were presented with a situation in which they did not want plaintiff to continue treating patients pending the outcome of the investigation and, in their judgment, upon the results of the investigation. The employment agreement contained a provision allowing the agreement to be terminated immediately "in the event the doctor lost his staff privileges at the hospital." Article III, paragraph (C). To take advantage of this provision defendants would have had to initiate proceedings to eliminate plaintiff's staff privileges under the staff bylaws, which would have afforded plaintiff due process rights in

connection with the proposed termination of staff privileges. Defendants, however, did not initiate such proceedings.[5]

III

On cross-appeal, plaintiff argues that that the trial court erred by limiting his contract damages to the 180-day period following the termination because the contract was never effectively terminated and damages continued to accrue. The construction and interpretation of a contract is a question of law that this Court reviews de novo. *Henderson v State Farm Fire and Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999).

Pursuant to Art III, paragraph 4(D), of the employment contract, either party could terminate plaintiff's employment "without a showing of cause and without liability to the other . . . upon not less than one hundred eighty (180) days written notice to the other." Plaintiff argues that his employment was not effectively terminated pursuant to paragraph 4(D) because, while the hospital did provide written notice to plaintiff, and although the plaintiff did in fact receive that notice, the notice was not sent to plaintiff in the manner required by Art III, paragraph 8 of the employment agreement:

> 8. Notice: Any and all notices, designations, consents, offers, acceptances or any other communications provided for herein shall be given to either party in writing, either by receipted personal delivery or by registered or certified mail, return receipt requested, addressed to the addressee . . .

Relying on this paragraph, plaintiff contends that his employment was never properly terminated by defendants and that he remains an employee of the hospital because he received the written notice of termination through the regular mail.[6]

Plaintiff relies solely upon defendants' admission that the notice was not sent by certified or registered mail and was therefore not in technical compliance with the agreement. The undisputed evidence, however, reveals that plaintiff did in fact receive the written notice required by the agreement. Additional proof of mailing of the written notice would serve no purpose in this case. Plaintiff has attempted to take advantage of a hyper technical construction and application of the employment agreement. Plaintiff has demonstrated no prejudice by the fact

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[5] In light of our resolution of the appeal, we need not address the remaining issues raised by defendants on appeal.

[6] In support of his argument that the contract could only be terminated pursuant to the method of termination set forth in the contract, plaintiff relies on *Lichnovsky v Ziebart Internat'l Corp*, 414 Mich 228; 324 NW2d 732 (1982). However, the issue in *Lichnovsky* did not center on the method of termination used to terminate the contract, nor did it center on the notice provisions of the contract. Rather, the opinion focused on the permissible bases for terminating the contract, and was not concerned with the technical requirements for effectuating that termination or providing notice of termination. Thus, the only issue addressed by the Court does not pertain to the issue raised in the present case.

that defendants sent the notice of termination by ordinary mail rather than by personal delivery or certified or registered mail.[7]

Affirmed in part, reversed in part, and remanded for a new trial. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Christopher M. Murray

[7] In light of our resolution of the appeal, we need not address the remaining issue raised on the cross-appeal.